



Signed: July 28, 2009

Leslie Tchaikovsky

LESLIE TCHAIKOVSKY
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re

No. 08-45683 TD
Chapter 7

LIPID SCIENCES, INC.,

Debtor.

LOIS I. BRADY, Trustee,

A.P. No. 08-4427 AT

Plaintiff,

vs.

ADMIRAL INSURANCE COMPANY;
RSUI INDEMNITY COMPANY; AND
WOODRUFF SAWYER & COMPANY,

Defendants.

MEMORANDUM OF DECISION

Plaintiff's motion to enforce a settlement agreement relating to the claims asserted against defendants Admiral Insurance Company ("Admiral") and RSUI Indemnity Company ("RSUI") in the above-captioned adversary proceeding and to strike Admiral's answer to the complaint came on for hearing before the above-captioned Court on June 18, 2009. Appearances were stated on the record. At the

1 conclusion of the hearing, the Court gave the parties leave to file
2 post-hearing briefs and otherwise took the matter under submission.
3 Having considered the issues presented and the argument made,
4 including the argument asserted in the post-hearing briefs, the Court
5 concludes that the motion must be denied without prejudice.

6 **SUMMARY OF FACTS AND PROCEDURAL HISTORY**

7 On October 1, 2008, the above-captioned debtor (the "Debtor")
8 wire transferred \$90,000 to defendant Woodruff-Sawyer & Co.
9 ("Woodruff-Sawyer") for the benefit of RSUI and wire transferred
10 \$131,484.36 to Admiral for its own benefit. The purpose of the
11 payments was to obtain an extension of the expiration date of an
12 Officers and Directors' Errors and Omissions Policy (the "E&O
13 Policy") from November 30, 2008 to October 4, 2011. Two days later,
14 on October 3, 2008, the Debtor filed a voluntary petition seeking
15 relief under chapter 7 of the Bankruptcy Code.

16 On December 30, 2008, plaintiff Lois I. Brady, the duly
17 appointed chapter 7 trustee, (the "Trustee") filed the above-
18 captioned adversary proceeding, seeking to avoid the wire transfers
19 as transfers that were both actually and constructively fraudulent
20 under 11 U.S.C. § 548(a)(1) and (2), among other things.

21 The complaint was served on all three defendants. Woodruff-
22 Sawyer filed a timely answer to the complaint. The Trustee gave
23 Admiral and RSUI extensions of time to file their answers. A
24 stipulation was filed giving RSUI until March 2, 2009 to file an
25 answer. The stipulation with respect to Admiral was not reduced to
26

1 writing but presumably the time accorded to file an answer has now
2 expired.

3 On March 2, 2009, the Trustee's counsel had a phone conference
4 with counsel for RSUI in which it was agreed that the claim would be
5 settled by rescission of the E&O Policy and payment by RSUI to the
6 Trustee of \$74,250: i.e., the \$90,000 wire transfer minus the
7 commission paid to Woodruff-Sawyer. On March 4, 2009, the Trustee's
8 counsel had a phone conference with counsel for Admiral in which
9 Admiral agreed to comparable settlement terms. The only difference
10 was that the amount of the payment to be made to the Trustee by
11 Admiral was not quantified because Admiral's counsel did not know at
12 that time the amount of the commission Admiral had paid to Woodruff-
13 Sawyer.

14 On March 5, 2009, a status conference was conducted in the
15 adversary proceeding. The Trustee and Admiral appeared through
16 counsel. RSUI was not represented at the status conference. The
17 Trustee informed the Court that she had entered into settlement
18 agreements with both Admiral and RSUI. Counsel for Admiral did not
19 contradict this statement. As a result, the status conference was
20 continued to June 18, 2009.

21 On April 9, 2009, counsel for Admiral called counsel for the
22 Trustee and informed her that his client had changed its mind about
23 the settlement. The Trustee's counsel responded that this was no
24 longer possible, that the settlement agreement was binding. Admiral
25 disagreed and filed an answer on April 10, 2009. Thereafter, RSUI
26

1 also declined to sign the proffered settlement agreement. However,
2 no answer has been filed by RSUI to date.

3 On May 12, 2009, the Trustee filed this motion to enforce the
4 both settlement agreements. Admiral and RSUI filed oppositions to
5 the motion and appeared at the June 18, 2009 hearing.

6 DISCUSSION

7 The Trustee's original motion to enforce the purported
8 settlement agreements with Admiral and RSUI relied primarily on
9 section 283(1) of the California Code of Civil Procedure. Section
10 283(1) provides that an attorney has the authority to "bind his
11 client in any of the steps of an action or proceeding by his
12 agreement filed with the clerk, or entered upon the minutes of the
13 Court, and not otherwise;...." See Cal. Civ. Proc. Code § 283(1).¹

14 In response, Admiral and RSUI argued that the relevant provision
15 of state law is section 664.6 of the California Code of Civil
16 Procedure. Section 664.6 states that a court may enter judgment in
17 pending litigation only pursuant to: (1) a writing signed by the
18 parties outside the court's presence or (1) an oral statement made in
19 the presence of the court. See Cal. Civ. Proc. Code § 664.6. They
20 asserted that the California Supreme Court has held that "parties" in
21 this context means the clients themselves and not just their
22 attorneys of record. See Levy v. Superior Court (Golant), 10 Cal. 4th
23

24 ¹Since no settlement agreement was filed with the clerk,
25 presumably, the Trustee is contending that the Trustee's counsel's
26 recitation of the settlement at the March 5, 2009 was sufficient to
create an enforceable agreement. At best, this would be sufficient
to bind Admiral since RSUI was not represented, even by counsel, at
the status conference.

1 578, 585 (1995). Since neither of the clients and only one of the
2 attorneys was present at the March 5, 2009 status conference, the
3 settlement agreement may not be enforced pursuant to this provision.

4 In reply and in her post-hearing brief, the Trustee contended
5 that section 664.6 is inapplicable to actions in federal court. At
6 the same time, she contended, section 283(1) is applicable in that it
7 describes the authority of an attorney to bind his client and does
8 not just set forth a procedural rule. The Court concludes that
9 neither provision, strictly speaking, is applicable here. The claims
10 asserted in the complaint are based on the Bankruptcy Code and this
11 proceeding is pending in federal bankruptcy court. Therefore,
12 federal law, both substantive and procedural, governs the issues
13 presented here.

14 The leading authorities in the Ninth Circuit hold that, to be
15 enforceable, a settlement agreement need only fulfill two
16 requirements. First, it must be a "complete settlement agreement."
17 Callie v. Near, 829 F.2d 888, 890 (9th Cir. 1987). Second, the
18 parties "must have either agreed to the terms of the settlement or
19 authorized their respective counsel to settle the dispute." McCovey
20 v. Pacific Lumber Co., 1992 U.S. Dist. LEXIS 10678, at *6-7 (N.D.
21 Cal. May 29, 1992)(citing Harrop v. Western Airlines, Inc., 550 F.2d
22 1143, 1145 (9th Cir. 1977)(per curiam)). The agreement need not be
23 in writing or recited in open court in the presence of the clients.
24 Oral settlement agreements may be enforceable if the parties intended
25 to be bound by the agreement and agreed on its material terms. See
26 Callie, 829 F.2d 891.

1 Admiral and RSUI contended that the settlement agreements were
2 not complete because there was no agreement with regard to third
3 party releases and/or indemnification from third party claims. Their
4 concern appears to be that the officers and/or directors who, on the
5 eve of bankruptcy, used the Debtor's money to purchase the E&O
6 Policies would sue them for agreeing to rescind the E&O Policies.
7 They cited Inamed Corp. v. Kuzmak, 275 F.Supp.2d 1100, 1125 (C.D.
8 Cal. 2002), for the proposition that release and indemnification
9 provisions are generally considered to be material terms of a
10 settlement agreement, particularly in the area of insurance.

11 The Court finds Admiral's and RSUI's arguments unpersuasive.
12 The Trustee is willing to give them complete releases. The draft
13 written agreement circulated by the Trustee contains such releases.
14 A chapter 7 trustee may not be expected to be able to obtain third
15 party releases. The Trustee's agreement to indemnify Admiral and
16 RSUI if the officers and/or directors sue them would be of little
17 value once the bankruptcy estate has been liquidated and the proceeds
18 distributed.

19 The Court is close to summarily adjudicating the issue of intent
20 in favor of the Trustee as well. The declaration of Louis J. Cisz,
21 III, the attorney for RSUI, is strong evidence that Admiral and RSUI
22 originally intended to be bound by the payment and rescission terms.
23 In the declaration, he states as follows:

24 7. Subsequent to the March 5, 2009 status
25 conference, Admiral Insurance Company **changed**
26 **its position** regarding a settlement.

 8. As the excess insurance carrier, RSUI
 analyzed its position relative to Admiral

1 Insurance Company's position and determined a
2 settlement at this time was not in RSUI's best
3 interest.
[Emphasis added.]

4 The declaration of Jason A. Fogg supporting Admiral's opposition
5 to the motion contains only the self-serving statement that Admiral
6 did not consider the agreement complete with the negotiated terms
7 regarding releases and indemnification. It does not state whether
8 this position was ever communicated by Admiral's counsel to the
9 Trustee's counsel. Whether or not a contract has been formed, as
10 well as its terms, is determined by the *expressed* intent of the
11 parties. When engaging in contract negotiations, a party may not
12 effectively keep to itself its private intent not to be bound. See
13 American Employers Group, Inc. V. Employment Development Department,
14 154 Cal. App. 4th 836, 847 (2007).

15 Unfortunately, the Trustee's counsel declaration does not
16 clearly state that this position was never communicated to her. If
17 it had, the Court would grant the Trustee's motion. Without such a
18 statement, the Court concludes it must deny the Trustee's motion.
19 However, the denial is without prejudice to the renewal of the motion
20 based on the submission of further evidence.

21 CONCLUSION

22 Based on the foregoing, the Court concludes that the Trustee's
23 motion to enforce the purported settlement agreements with Admiral
24 and RSUI must be denied without prejudice. The procedural history of
25 the case renders it inappropriate to enforce the agreements
26 summarily. The Court finds as a matter of law that the terms of the

1 settlement agreement are sufficiently complete to render them
2 binding. However, the Court finds the evidence presented on the
3 intent of Admiral and RSUI to enter into a binding settlement
4 agreement without negotiation of further terms to be inadequate to
5 support a finding as a matter of law in favor of either party.
6 Counsel for the Trustee is directed to submit a form of order in
7 accordance with this decision.

8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
END OF DOCUMENT

COURT SERVICE LIST

Reidun Stromsheim
Stromsheim and Associates
201 California St. #350
San Francisco, CA 94111

Phillip K. Wang
Law Offices of Gordon and Rees
275 Battery St. #2000
San Francisco, CA 94111

Louis J. Cisz, III
Nixon Peabody LLP
One Embarcadero Center, 18th Fl
San Francisco, CA 94111-3600

Gregg M. Ficks
Coblentz, Patch, Duffy and Bass
1 Ferry Bldg. #200
San Francisco, CA 94111